

**Fleming Companies, Inc. and Teamsters Local Union 667 affiliated with International Brotherhood of Teamsters, AFL-CIO, Petitioner.** Case 26-RC-7907

November 30, 1999

**DECISION, DIRECTION, AND ORDER**

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in and objections to an election held on April 30, 1997 and the hearing officer's report recommending disposition of them (pertinent portions of which are attached as an appendix). The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 65 for and 63 against the Petitioner, with 9 challenged ballots, a sufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs and has decided to adopt the hearing officer's findings<sup>1</sup> and recommendations.<sup>2</sup>

<sup>1</sup> Contrary to our dissenting colleague, we adopt the hearing officer's recommendation to overrule the challenge to the ballot of leadman Robert Marston. The burden of proving supervisory status rests with the party asserting that status and the Petitioner has failed to meet its burden. As the hearing officer found, the record establishes that Marston's direction and assignment of unit employees is routine or clerical in nature and requires no exercise of independent judgment. *McCullough Environmental Services*, 306 NLRB 565 (1992). While the record reflects that Marston has issued standard disciplinary warnings for attendance violations, we agree with the hearing officer that there is no evidence that the issuance of these attendance warnings is discretionary. The disciplinary warnings for attendance violations are standard preprinted forms automatically generated from Aldridge's office once an employee has accumulated a specific number of absences or occurrences. The Employer's recordkeeper, Peggy Cates, keeps track of each employee's occurrence level, generates the disciplinary form once a set level of occurrences has been reached, and gives the form to the leadperson for distribution to the employee. Marston's role in the issuance of disciplinary warnings is therefore limited to the nondiscretionary recording of instances of tardiness and absences and the distribution of a standard disciplinary form generated elsewhere. It does not involve the exercise of independent judgment. See *Green Acres Country Care Center*, 327 NLRB 257 (1998); *Azusa Ranch Market*, 321 NLRB 811, 812 (1996). With regard to Marston's issuance of a warning to employee Stanley Jones, we agree with the hearing officer that this incident did not involve the exercise of independent judgment. As the hearing officer noted, the December 18, 1996 warning to Jones is for attendance violations and merely reports that Jones left early from work and failed to return from lunch on time. The document is signed by the warehouse manager and distribution manager in addition to Marston and contains no recommendation by Marston regarding any disciplinary action to be taken against Jones. The Employer presented uncontradicted testimony that any discipline communicated by a leadman to an employee is pursuant to management's directive. Under these circumstances, Marston's role as a mere conduit for management's directive is insufficient evidence of independent judgment within the meaning of Sec. 2(11). *Chicago Metallic Corp.*, 273 NLRB 1677, 1693 (1985); *Injected Rubber Products Corp.*, 258 NLRB 687, 691 (1981). Member Hurtgen also relies on testimony that Marston has been referred to as a "supervisor." The Board, however, has long held that the use of a title does not make an employee a supervisor. *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976). Member Hurtgen further relies

**DIRECTION**

IT IS DIRECTED that the Regional Director for Region 26 shall, within 14 days from the date of this Decision, Direction, and Order, open and count the ballots of Cheryl Carr, Robert Marston, Katie Richard, Terry Woodard, Jeff Wooten, Helen Bachus, and Jimmy Jones and thereafter prepare and serve on the parties a revised tally of ballots. If the revised tally shows the Petitioner has received a majority of the votes cast, the Regional Director shall issue a certification of representative. If the revised tally shows a majority of votes cast against the Petitioner, the election shall be set aside and a second election shall be conducted.

**ORDER**

It is ordered that this proceeding is remanded to the Regional Director for Region 26 for further appropriate action.

MEMBER HURTGEN, dissenting in part.

I agree with the majority's disposition of the objections and challenges in this case, except that I find that leadman Robert Marston is a statutory supervisor. I would sustain the challenge to his ballot.

The hearing officer found that Marston became a leadman in the receiving area in January 1997. In that capacity, Marston is responsible for overseeing and directing the work activities of approximately 16 checkers and operators. Marston seldom does production work, and spends most of his time in an office. He makes weekly job assignments for the employees in his charge, and schedules and assigns overtime. Marston also issued an oral warning (reduced to writing) to an employee for leaving work early and returning late from lunch. Although Distribution Manager Aldridge signed the warning the next day, this would only show, at most, that Aldridge was the final decision-maker. Even if this is so, Marston effectively recommended the warning.<sup>1</sup>

My colleagues note that the warning was signed by Aldridge and Marston, and that it contained no recommendation by Marston. However, they ignore the fact that Marston signed it and forwarded it to Aldridge who signed it the next day. Although there was no express "recommendation" place on the form, the aforemen-

on the fact that "acknowledged supervisors" Williams and Daugherty, previously performed the duties currently performed by Marston. Although the Employer reorganized its warehouse operation and created leadman positions to perform some of the duties previously performed by acknowledged supervisors, the Petitioner has failed to establish that Marston assumed supervisory authority as well as those leadman duties.

<sup>2</sup> In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendations that the Petitioner's Objections 4, 5, 6, and 7 be overruled and that the Employer's objections be overruled in their entirety.

<sup>1</sup> The hearing officer found that Marston does not exercise independent judgment with respect to the issuance of reprimands. The hearing officer made no similar finding with respect to the recommendation of warnings.

tioned evidence is consistent with the fact that Marston made a recommendation to Aldridge who concurred with it on the following day.

In any event, the evidence concerning absences is even clearer. The hearing officer stated: "The record establishes that leadpersons have issued disciplinary warnings for attendance violations." The recipient of these warnings is charged with points. And, "once an employee has accumulated a certain number of points, disciplinary action automatically occurs." Thus, a warning, i.e., the product of the leadperson, is a step on the road to adverse action. Concededly, the "action" form is signed by others, but that is automatic. The important fact is that the points (which lead to the action) are the product of the leadperson. My colleagues have confused disciplinary *warnings* with disciplinary *actions*. As noted above, a warning is issued by the leadperson. After a certain number of warning (Cates is the recordkeeper), disciplinary action is automatic and is reported on a disciplinary form generated by her office. In sum, the disciplinary warning is discretionary; the disciplinary action, after a certain number of warnings, is automatic.

Individuals who had previously held Marston's position and did the same work, Arthur Williams and Rick Dougherty, were acknowledged supervisors. There is no showing that the position was stripped of its authority when Marston was appointed. My colleagues suggest that Marston took over only the nonsupervisory functions of Williams and Dougherty. The record does not support the notion of only a partial takeover. Indeed, the Employer's human resources manager, Gaither, testified that management has referred to Marston as a supervisor.<sup>2</sup>

Based on these facts, I would find that Marston is a statutory supervisor, and I would therefore sustain the challenge to his ballot.

#### APPENDIX

##### HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS TO ELECTION AND CHALLENGED BALLOTS

Based on a petition filed on April 16, 1997,<sup>2</sup> and pursuant to a Stipulated Election Agreement approved by the Acting Regional Director for Region 26 on April 30, an election by secret ballot was conducted on June 4, among certain employees<sup>3</sup> of the Employer. Upon the conclusion of the election, the parties were furnished a tally of ballots which disclosed that of ap-

proximately 139 eligible voters, 65 cast votes for Petitioner and 63 cast votes against the Petitioner. There were 9 challenged ballots which were a sufficient number to affect the results of the election.

On June 11, both the Employer and the Petitioner filed timely objections to conduct affecting the results of the election. Copies of the Employer's and the Petitioner's objections are attached hereto.

Upon consideration of the matter, the Regional Director concluded that certain of the objections of both the Employer and the Petitioner, as well as, the nine challenged ballots raised substantial and material issues best resolved on the basis of record testimony.<sup>4</sup> Accordingly, on September 25, the Regional Director, pursuant to Section 102.69(d) of the Board's Rules and Regulations, issued a notice of meaning on objections and challenges directing that a hearing be conducted on the issues raised by the objections and challenges. Thereafter, the hearing was held on October 6, 7, 8, and 9 in Memphis, Tennessee, before the me.

The Petitioner and Employer, both appeared through counsel and participated in the hearing. Both parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues and to file briefs.<sup>5</sup>

Upon consideration of the entire testimonial record of the case including exhibits and from my observations of the witnesses, I hereby make the following findings of fact,<sup>6</sup> conclusions, and recommendations

#### FINDING OF THE FACT

The Employer operates a warehouse distribution facility in Memphis, Tennessee, where it distributes an array of products, including health and beauty aids, general merchandise, and specialty foods. The Employer's facility is composed of two separate warehouses linked by two tunnels. The warehouses are referred to separately as the Burbank Building and the Hungerford Building. Together the buildings comprise what is known as the Fleming Memphis GMD Warehouse. In addition to the main warehouse distribution facility, the record establishes that the Employer's facility is also comprised of an accounting department, data processing department, marketing department, and a marketing merchandising department.

There are approximately 139 regular hourly employees employed at the warehouse. Additionally, the Employer routinely utilizes temporary employees from various temporary agencies. For the most part, employees begin work between 6 and 7 a.m. They work until the orders are all completed. The record reflects that Russ Hill is president and Danny Gaither is the Employer's human resources manager. Moreover, the following individuals occupy the office next to their name:

<sup>2</sup> I do not suggest that this reference establishes supervisory status. I simply note that it is an indicum that Marston stepped into the shoes of Williams and Dougherty.

<sup>3</sup> All dates are 1997 unless otherwise indicated.

<sup>4</sup> All distribution center employees, including order selectors, receiving clerks, loaders, plant clerical employees, warehouse salvage employees, stockers, forklift operators, quality control checkers, merge operators, hostler, warehouse checkers, sanitation, and maintenance employees employed by the Employer at its 4881 Burbank Road, Memphis, Tennessee facility. Excluding all office clerical employees, sales employees, temporary employees, professional employees, technical employees, guards and supervisors as defined in the Act.

<sup>5</sup> The Employer withdrew Objection 11. The Petitioner withdrew Objection 3.

<sup>6</sup> The facts found herein are based upon the record as a whole and upon my observations of the witnesses. The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits with due regard to the logic of probability and the demeanor of the witnesses. As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was, in and of itself, incredible and unworthy of belief.

Mark Aldridge	Distribution Manager
John Keogh	Accounting Manager
Doug Sanders	Special Projects Supervisor
Dennis Strait	Warehouse Manager (North End)
Mark Henry	Warehouse Manager (South End)
Allen Lee	Loss Control Supervisor
Shirley Newsome	Warehouse Supervisor
Rose Gholston	Warehouse Supervisor
Dwaine Hooker	Transportation Superintendent
Arthur Williams	Warehouse Supervisor (Shipping)

It is undisputed that each of the above individuals has the authority to hire, fire, and discipline employees and are supervisors within the meaning of Section 2(11) of the Act. With the exception of Williams, who works in the Hungerford Building, all of the above individuals work in the Burbank Building.

Aldridge, who has worked for the Employer for 20 years, assumed his current position at the Memphis facility in August 1996. He subsequently implemented certain organizational changes within the warehouse. Among the changes was the creation of certain lead positions. The record reflects that in April, Aldridge met with the warehouse employees to inform them of the changes. During the meeting most of the lead people were introduced to employees. Although some of the lead positions resulted from the reorganization, the record reflects that several of the lead people assumed their positions prior to the restructuring. At any rate, the following individuals occupy the lead positions at issue herein: Cheryl Carr, Robert Marston, Jim Phelan, Katie Richmond, Terry Woodard, Jeff Wooten, and Mitch Zweig.

#### The Challenges

During the hearing and in its brief, the Petitioner took the position that the lead people identified above were supervisors within the meaning of Section 2(11) of the Act. Thus, the Petitioner argues that these individuals should be excluded from the unit. Conversely, the Employer argues that the lead people are not supervisors and should be included in the unit.

Moreover, the Petitioner challenged the eligibility of employees, Helen Bachus and James (Jimmy) Jones. The Petitioner takes the position that these individuals should be excluded from the unit because they lack a sufficient community of interest with unit employees. The Employer argues that Bachus and Jones share a sufficient community of interest with employees and should be included in the unit.

#### The Challenged Lead People

The record establishes that the lead people are hourly employees who share substantially the same fringe benefits as the unit employees. They are all required to punch in on a time-clock and are paid on a weekly basis. Lead people are paid overtime in the same manner as other hourly employees. All hourly employees are subject to the same rules and policies. For example, they all are required to produce a doctor's statement when they are absent because of illness. Hourly employees are able to build up a sick day bank which allows them to accumulate up to 35 paid sick days (depending on tenure) a year. Hourly employees are also eligible for sick pay bonuses. The record further establishes that lead people are evaluated in the same manner as the other hourly employees. Furthermore, lead people have to bid along with other hourly employees for vacations, with all being required to take vacation in 1 week blocks.

The only benefit that lead people receive distinguishable from hourly employees is a 15 cents hourly premium pay.

Conversely, supervisors are salaried personnel who are exempt from overtime pay requirements. They are paid every 2 weeks. Supervisors are not subject to the attendance policy. Nor, are they required to produce a doctor's statement in support of medical absences. Supervisors do not build up any type of sick bank and are not entitled to sick pay bonuses. Their salary is not docked when they are out ill. Supervisory evaluations are based on financial results and differ from those of hourly employees. Supervisors do not bid with hourly employees for vacations. Moreover, supervisors and hourly employees participate in different types of short term disability programs.

The record establishes that as a part of Aldridge's restructuring, Supervisor Dwaine Hooker was moved from a supervisory position in inventory to his current position of transportation superintendent. Aldridge testified that after reviewing Hooker's duties as inventory supervisor he (Aldridge) determined that there was no longer a need for the position to be a supervisory one.<sup>7</sup> Accordingly, Hooker was offered the position in transportation and his former position was reclassified as a lead position. Aldridge testified that none of the lead positions were posted for bid, as are other hourly positions. Rather, he selected each of the individuals for the various lead positions. During the course of the hearing there was testimony regarding the job duties and authority of each of the leads. For the most part, the lead people have similar responsibilities and authorities. However, the credible record evidence reveals that some of the leads possess and exercise more authority than others. Accordingly, I shall discuss the relevant facts surrounding the eligibility of each of the seven leads separately.

*Robert Marston:* Marston became a leadperson in the receiving area in January. He reports directly to Dennis Strait, warehouse manager for the north end. According to Aldridge, Marston's duties include receiving calls from truck lines and communicating with them with respect to scheduling delivery of products to the Employer. He is also responsible for overseeing the activities of the checkers and operators. The record reflects that there are approximately 16 employees who work under Marston. The record further reflects that when the Employer posts positions for forklift operators Marston is identified as the individual the employee will report to.

Aldridge and Gaither both testified that Marston had no authority to discipline employees. However, upon further questioning by Petitioner as to whether or not Marston has ever reprimanded an employee, Gaither responded that he was not suppose to Gaither acknowledged that there was a time in the past when Marston was referred to as a supervisor by management. Arthur Williams and Rick Daugherty, both acknowledged supervisors, previously performed the duties currently performed by Marston. The Employer provided no explanation as to why the position was no longer considered a supervisory one.

Louise Burton has been employed by the Employer for 20 years. She is a forklift operator. She is one of the employees who reports to Marston. According to Burton, Marston instructs

<sup>7</sup> The record reflects that a major portion of Hooker's responsibilities as inventory supervisor no longer existed. In that regard, Aldridge testified that Hooker had been working with the corporate office on several special projects which had been completed. The remaining duties Hooker performed were of a nonsupervisory nature. Thus, Aldridge testified the position was reclassified as a nonsupervisory one.

her on a daily basis regarding her job duties. Burton testified that Marston posts weekly job assignments. He spends the majority of his time in his office and seldom engages in hourly production work. On one occasion Burton placed merchandise in the wrong area. Marston called her in the office and instructed her to move it and place it in the correct area. However, there is no evidence that this incident had any impact on Burton's job status. According to Burton, Marston determines when employees will have to work over. Burton testified that if she has to be off work she notifies Marston. Burton also testified that Marston holds employee meetings and conducts forklift training.

Annette Bland has been employed by the Employer for 13 years. She is a forklift operator in receiving. She began working under the supervision of Marston in August. It was her testimony that every individual who has held the position Marston holds has been considered a supervisor. She identified Mark Henry, Arthur Williams, and Rick Daugherty as individuals who had previously held the position and were referred to as supervisors. She stated that she had not heard of a leadman classification until after the union campaign started. Bland's testimony was consistent with Burton, in that she (Bland) testified that Marston makes weekly job assignments and schedules overtime. She also stated that she notifies Marston when she will not be in to work.

Finally, Gloria Lean Minion testified on behalf of Petitioner. She has been employed by the Employer for 21 years. She is an order selector. At the time of the hearing she worked under the supervision of Shirley Martin. However, she previously worked under the supervision of Marston. Minion testified that Marston reports to work at 6 a.m., while Strait comes in 30 minutes to an hour later. According to Minion, she would contact Marston when she would be absent from work and also presented him with doctor's excuses upon her return to work.

Aldridge and Gaither both testified that discipline directives are standard procedures and originates with managers and supervisors. It is only when a leadperson has been instructed by upper management or supervisory personnel to issue discipline that he or she may do so. The record establishes that leadpersons have issued disciplinary warnings for attendance violations. Under the Employer's attendance policy employees are assessed points for absences. Once an employee has accumulated a certain number of points disciplinary action automatically occurs. Specifically, the Employer utilizes a preprinted disciplinary form for attendance violations. The form contains a space for the number of absences an employee has accumulated. The standard form is automatically generated from Aldridge's office once the employee has accumulated a specific number of points or occurrences. There is no evidence that issuance of discipline for attendance violations is discretionary. The record reflects that Marston has issued these standard disciplinary forms.

Additionally, the record reveals that Marston has also issued a disciplinary warning to former employee Stanley Jones for leaving work early and returning from lunch late on December 18, 1996. The warning appears to be an oral warning reduced to writing. It calls for progressive discipline in the event of another infraction. See Petitioner's Exhibit 31. The document reflects that Aldridge initialed it and signed off on it the following day. Although there is no evidence that Marston has ever discharged an employee, the record establishes that he provided information to Aldridge which led to Jones' termination. How-

ever, the record fails to establish that Marston made any recommendation to Aldridge reboarding what action should be taken against Jones.

### Recommendations

The term *supervisor* is defined as any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. In enacting Section 2(11) of the Act, Congress stressed that only persons vested with "genuine management prerogatives" should be considered supervisors. *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985) (citing S. Rep. No. 105 80th Cong., 1 Sess. 4 (1947), affd. in relevant part 794 F.2d 527 (9th Cir. 1986). Thus, the Board has a duty to employees not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied . . . rights which the Act is intended to protect. *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), cert. denied 400 U.S. 831 (1970). Moreover, the burden of proving supervisory status rests with the party who alleges that it exists. *California Beverage Co.*, 283 NLRB 328 (1987). A mere inference of independent judgment without specific support in the record is insufficient to warrant a finding of supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Rather, the record as a whole, must establish that an alleged supervisor's role is something other than routine communication of instructions between management and employees without the exercise of any significant discretion. *McCullough Environmental Services*, 306 NLRB 565 (1992).

On the basis of the foregoing and the record as a whole, I recommend that leadpersons, Carr, Marston, Richmond, Woodward, and Wooten; be found not to be supervisors within the meaning of Section 2(11) of the Act. An application of the legal standards as enunciated by the court and the Board to the instant facts fails to establish that the Petitioner has met its burden of proving the supervisory status of the named individuals. Although the evidence establishes that the lead people spend little time engaged in actual production work; are referred to as supervisors by other employees and perform some supervisory type" functions (such as issuing verbal reprimands, providing input regarding evaluation of probationary and permanent employees, handling employee timecards) there is no evidence that during the performance of said duties they exercise independent judgment. To the extent that these individuals direct the work of other employees or make job assignments, the record establishes that such direction or instruction is routine in nature. Furthermore, employees testified that they generally know what to do and require little instruction or direction in performing their tasks. Any functions the lead people perform with respect to time cards and vacation requests are clerical in nature and insufficient to confirm supervisory status upon them.

Although the evidence establishes that lead people are contacted by employees when they will miss work, the evidence fails to establish that the lead people actually grant employees time off. Rather, in instances when the lead persons are contacted the employee is not seeking permission to miss work. Instead, the employee is merely providing notification that

he/she will not be in. This information is then relayed to higher management.

Furthermore, in those cited instances when lead persons have either issued warnings to employees or been involved in disciplinary action taken against another employee the record establishes that the leadperson used no independent judgment when issuing the reprimands, which were for attendance violations. Those preprinted disciplinary forms were generated from personnel and the employees generally expect discipline when they accumulate a certain number of points. Moreover, the Employer established that it conducted an independent investigation of the one discharge incident referenced during the hearing. In that situation there was no evidence that the leadperson involved made any type recommendation regarding discipline.

In the absence of primary indicia of supervisory authority evidence of secondary indicia such as that proffered by the Petitioner, cannot provide a basis for a supervisory finding. *Billows Electric Supply*, 311 NLRB 878 fn. 2 (1993). Under these circumstances, the record as a whole, fails to support the

Petitioner's challenges to the eligibility of these lead people. Accordingly, I recommend that the Petitioner's challenges to the ballots of Carr, Marston, Richmond, Woodard, and Wooten be overruled and that their ballots be opened and counted.

#### Conclusions and Recommendation

Having recommended that Petitioner's Objections 1, 5, 6, and 7; the Employer's objections in their entirety and the challenges to the ballots of Cheryl Carr, Robert Marston, Katie Richmond, Terry Woodard, and Jeff Wooten be overruled and having recommended that Petitioner's Objection 2, as well as the challenges to the ballots of Glitch Zweig and Jim Phelan be sustained, I further recommend that should the Union fail to receive a majority of the ballots once the ballots of Carr, Marston, Richmond, Woodard, and Wooten are opened and counted, that the election held on June 4, 1997, be set aside and a second election directed.